

IN THE SUPREME COURT OF FLORIDA

JOHNNY LEE KEYS, JR.,)
)
 Petitioner,)
)
 vs.)
)
 STATE OF FLORIDA,)
)
 Respondent.)
 _____)

CASE NO.

PETITIONER'S BRIEF ON JURISDICTION

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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DAYTONA BEACH, FLORIDA

TABLE OF CONTENTS

	<u>PAGE NO.</u>
TABLE OF CONTENTS	i
TABLE OF CITATIONS	ii
ISSUE	
WHETHER EXPRESS AND DIRECT CONFLICT EXISTS FOR THIS COURT TO REVIEW THE INSTANT CASE PURSUANT TO ARTICLE V, SECTION (3) (b) (3), FLORIDA CONSTITU- TION.	3
CONCLUSION	4
CERTIFICATE OF SERVICE	4

TABLE OF CITATIONS

CASES CITED:

PAGE NO.

Albritton v. State

458 So.2d 320 (Fla. 5th DCA 1984), Supreme Court
No. 66,169

3

Burke v. State

456 So.2d 1245 (Fla. 5th DCA 1984), Supreme Court
No. 66,091

3

Deer v. State

462 So.2d 96 (Fla. 5th DCA 1985), Supreme Court
No. 66,532

3

Hankey v. State

458 So.2d 1143 (Fla. 5th DCA 1984), Supreme Court
No. 66,091

3

Hendrix v. State

455 So.2d 449 (Fla. 5th DCA 1984), Supreme Court
No. 65,928

3

Jollie v. State

405 So.2d 418 (Fla. 1981)

3

OTHER AUTHORITIES:

Article V, Section (3)(b)(3), Florida Constitution

3

SUMMARY OF THE ARGUMENT

This Court should exercise its discretionary jurisdiction to review the decision of the Fifth District Court of Appeal in this case. The opinion of the Court of Appeal is based on cases which are before this Court for review.

STATEMENT OF THE CASE AND FACTS

The issues herein arose from Petitioner entering pleas of guilty to sexual battery, robbery and aggravated battery. Petitioner's recommended guideline sentence was twelve to seventeen (12-17) years incarceration. Petitioner was sentenced in the Circuit Court to a total of two hundred fifteen (215) years incarceration. Reasons for departure included Petitioner's prior record, his failure to reform after being punished in the past, physical and psychological injury to the victim, threat to the community, Petitioner's inability to live in a non-structured environment, and Petitioner's benefiting from a favorable plea bargain.

In the District Court of Appeal, Petitioner argued that trial court's reasons for departure were not "clear and convincing" since Petitioner's prior record had already been accorded significant weight in arriving at the recommended sentence of twelve to seventeen (12-17) years. It was also argued that even if one or more of the reasons for departure were proper, several were clearly improper and the sentence should be reviewed. Petitioner also argued that a two hundred (200) year departure was clearly excessive.

The Fifth District Court of Appeal held that " ... the reasons set out by the trial judge ... Key's violation of probation, his escalating course of violent criminal conduct indicating that he is unsuitable for probation or community control and the facts and circumstances relating to the present offense --

provide clear and convincing reasons supporting departure from the guidelines". The Court of Appeal also held that "Any reference by the trial judge to impermissible reasons for departure from the guidelines does not vitiate these valid reasons". The opinion of the Fifth District Court of Appeal on these issues is based on cases which are pending review in this Court.

ISSUE

WHETHER EXPRESS AND DIRECT CONFLICT
EXISTS FOR THIS COURT TO REVIEW THE
INSTANT CASE PURSUANT TO ARTICLE V,
SECTION (3) (b) (3), FLORIDA CONSTITU-
TION.

An opinion by a District Court of Appeal which cites as controlling authority a decision which is pending review before the Supreme Court allows the Supreme Court to exercise its jurisdiction. Jollie v. State, 405 So.2d 418 (Fla. 1981). In the case at bar, five of the seven cases cited by the Court of appeal which deal with the issues involved here are pending review in this Court. These include Deer v. State, 462 So.2d 96 (Fla. 5th DCA 1985), Supreme Court No. 66,532; Hankey v. State, 458 So.2d 1143 (Fla. 5th DCA 1984), Supreme Court No. 66,320; Burke v. State, 456 So.2d 1245 (Fla. 5th DCA 1984), Supreme Court No. 66,091; Hendrix v. State, 455 So.2d 449 (Fla. 5th DCA 1984), Supreme Court No. 65,928; and Albritton v. State, 458 So.2d 320 (Fla. 5th DCA 1984), Supreme Court No. 66,169.

This Court clearly has jurisdiction as to the prior record issue and the issue of whether a departure should be reviewed if based on both good and bad reasons. The issue of length of departure was raised in but not addressed by the Court of Appeal, and may present an issue in this Court, See Albritton, supra.

CONCLUSION

BASED UPON the argument and authority presented herein, this Court is requested to exercise the jurisdiction that clearly exists.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I DO HEREBY CERTIFY that a true and correct copy of the foregoing has been served upon the Honorable Jim Smith, Attorney General, 125 N. Ridgewood Avenue, Fourth Floor, Daytona Beach, Florida 32014; and mailed to Johnny Lee Keys, Jr., Inmate No. 039841, #W.U. 51-1002, Union Correctional Institute, Post Office Box 221, Raiford, Florida 32083, on this 20th day of August, 1985.

Kenneth Witts
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